

Appellate Mediation in the Federal and State Courts

Wednesday, July 28, 2010 1:30 – 4:00 p.m. Dena'ina Civic and Convention Center Anchorage, Alaska These materials are presented with the understanding that the publisher and authors do not render any legal, accounting, or other professional service. Due to the rapidly changing nature of the law, information contained in these publications may become outdated. As a result, an attorney using these materials must always research original sources of authority and update this information to ensure accuracy when dealing with a specific client's legal matters. In no event will the authors, the reviewers, or the publisher be liable for any direct, indirect, or consequential damages resulting from the use of these materials.

Alaska Bar Association

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This certifies that	has attended the
	g Legal Education (CLE) presentation,
	al and State Courts on Wednesday,
July 28, 2010, at the Dena'ina Civi	
Anchorage, AK .	

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Appellate Mediation in the Courts Wednesday, July 28, 2010

Wednesday, July 28, 2010
Dena'ina Civic & Convention Center, Anchorage
CLE # 2010-046

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OVERALL, I	I found the pro	gram to be:					
	Excellent	Good	☐ Fai	ir [☐ Poor		
My level of	satisfaction wi	th this program (please circle	your answer):			
		Very Satisfied	Satisfied	Disappointed	Very Disappointed		
Practical val	ue	1	2	3	4		
Format of th	ne presentation	1	2	3	4		
Speaker/Fac	culty overall	1	2	3	4		
Did you lea	rn anything of	practical value to	oday? If so	, what was it?			
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Do you like	this type of fo	rmat (panel, sing	le presente	r, full or half-da	y program)? 		
Did the cou	rse material in	clude relevant in	formation?				
Was the fac	ility comfortab	le and convenien	nt for you?				
What topic	would make a ş	good companion	program or	spin off for this	CLE?		
What other	CLE topics wo	uld you like to se	e presented	1?			
Are you will	ling to be a Pre	senter or serve o	n a Plannin	g Committee?			
□ Yes	Name (Please Print):						
Presenter	Topic:						
☐ Yes Comm.							

FACULTY

Elaine Andrews retired from the 3rd Judicial District Superior Court Bench in 2002 and has an active mediation practice with Andrews ADR Services. She also continues to serve as a Senior Judge with the Appellate Court Mediation Project. Senior Judge Andrews was appointed to the District Court in 1981 and to the Superior Court in 1991. Prior to her service in the family, criminal, and civil divisions with the court system, she practiced law in the public and private sectors in criminal and civil litigation on behalf of defendants and plaintiffs. While with the court, she served as Presiding Judge of the 3rd Judicial District, a judge member of the Alaska Commission on Judicial Conduct, and was a member of the Supreme Court Mediation Committee and the Criminal Rules Committee.

Claudia Bernard is the Chief Circuit Mediator for the Ninth Circuit Court of Appeals. In this capacity she both runs the court's Circuit Mediation Office - managing and training a staff of eight full-time professional mediators - and mediates civil cases on appeal. Prior to her appointment as Chief Circuit Mediator she served as a Ninth Circuit Mediator for eighteen years. Ms. Bernard has taught negotiation and mediation nationally and internationally, and has trained mediators for numerous courts, both nationally and internationally. Before coming to the Ninth Circuit, Ms. Bernard practiced as a civil litigator in San Francisco, and clerked for a federal judge. She is an honors graduate of the University of California at Berkeley, and the University of California Hastings College of Law.

Judge Richard R. Clifton

Born 1950 in Framingham, Mass.

Federal Judicial Service:

U.S. Court of Appeals for the Ninth Circuit; Nominated by George W. Bush on September 4, 2001, to a seat vacated by Cynthia Holcomb Hall; Confirmed by the Senate on July 18, 2002, and received commission on July 30, 2002. Education:

Princeton University, A.B., 1972 Yale Law School, J.D., 1975 Professional Career:

Law clerk, Hon. Herbert Y.C. Choy, U.S. Court of Appeals for the Ninth Circuit, 1975-1976 Private practice, Honolulu, Hawaii, 1977-2002 Adjunct professor, University of Hawaii, Richardson School of Law, 1978-1980, 1983-1989

Lloyd B. Miller has practiced law in Washington D.C. and Alaska for 31 years with the law firm Sonosky, Chambers, Sachse, Miller and Munson, LLP. His practice is focused on representing Alaska Native and other Native American interests, and includes substantial litigation. He has handled appeals in the United States Supreme Court, in the Ninth, Tenth and Federal Circuit Courts

of Appeal, and in the Alaska Supreme Court, and in 2005 he secured a unanimous Supreme Court decision against the federal government in *Cherokee Nation v. Leavitt*, 543 U.S. 631. Mr. Miller also serves as Plaintiffs' Liaison Counsel in the federal and state EXXON VALDEZ litigation. Mr. Miller received his undergraduate degree from Yale University and his law degree with honors from the University of Virginia.

Judge Diarmuid Fionntain O'Scannlain

Born 1937 in New York, NY

Federal Judicial Service:

Judge, U. S. Court of Appeals for the Ninth Circuit

Nominated by Ronald Reagan on August 11, 1986, to a seat vacated by Robert Boochever; Confirmed by the Senate on September 25, 1986, and received commission on September 26, 1986.

Education:

St. John's University, B.A., 1957

Harvard University, J.D., 1963

University of Virginia School of Law, LL.M., 1992

Professional Career:

U.S. Army Reserve, JAG Corps, 1955-1978

Tax attorney, Standard Oil Company of New Jersey and New York City, 1963-1965

Private practice, Portland, Oregon, 1965-1969

Deputy state attorney general, Oregon State Department of Justice, 1969-1971 Public utility commissioner, Oregon 1971-1973

Director, Oregon Department of Environmental Quality, 1973-1974

Private practice, Portland, Oregon, 1975-1986

Consultant, Office of the President-Elect of the United States, 1980-1981 Team leader, President's Private Sector Survey on Cost Control/Grace Commission, 1982-1983

Chairman, Advisory Panel to the U.S. Secretary of Energy, 1983-1985

Judge Mary M. Schroeder, Chief Judge of the United States Court of Appeals for the Ninth Circuit from December 2000 through November 2007. Judge Schroeder has served on that court since 1979. She previously served on the Arizona Court of Appeals and practiced law in Phoenix. She is a graduate of Swarthmore College and the University of Chicago Law School. After graduation she was a trial lawyer in the Civil Division of the U.S. Department of Justice. Judge Schroeder has also taught at Arizona State University Law School and received its Distinguished Service Award. She has been an adjunct lecturer at Duke University Law School and has published articles and lectures in various law reviews. She is a member of the council of the American Law Institute, a recipient of the Arizona State University College of Public Programs 2004 Distinguished Achievement Award, Arizona State Bar Association James A. Walsh Outstanding Jurist Award, and 2001 American Bar Association Margaret Brent Award, recipient of a Distinguished Honorary Alumna

Convocation Award from the James E. Rogers College of Law, University of Arizona in 2005, and the Joan Dempsey Klein NAWJ Honoree of the Year Award in 2006. She has her chambers in Phoenix Arizona.



Mediation in the Ninth Circuit Court of Appeals

UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT

A Message From The Chief Judge

For over twenty years, the Ninth Circuit Court of Appeals has operated a court mediation and settlement program. During that time, experienced and skilled circuit mediators have worked cooperatively with attorneys and their clients to resolve a variety of disputes. The disputes mediated range from the most basic contract and tort actions to the most complex cases involving important issues of public policy. The mediators have even successfully resolved death penalty cases. No case is too big or too small for mediation in the court's program.

The court offers this service, at no cost, because it helps resolve disputes quickly and efficiently and can often provide a more satisfactory result than can be achieved through continued litigation. Each year the mediation program facilitates the resolution of hundreds of appeals.

The judges of the Ninth Circuit are extremely proud of the professional work of the nine circuit mediators, all of whom are full-time employees of the court. They are highly experienced and qualified attorneys from a variety of practices and have extensive training and experience in negotiation, appellate mediation, and Ninth Circuit practice and procedure.

Although the mediators are court employees, they are well shielded from the rest of the court's operations. The court has enacted strict confidentiality rules and practices; all who participate in one of the court's mediations may be assured that what goes on in mediation stays in mediation.

Experience has shown that counsel and litigants will find professional, efficient and effective mediation services from the court's highly regarded Circuit Mediation Office.

Alex Kozinski, Chief Judge

MEDIATION IN THE NINTH CIRCUIT

The court established the Ninth Circuit Mediation Program pursuant to Federal Rule of Appellate Procedure 33 and Circuit Rule 33-1 to facilitate settlement of cases on appeal.

A. How Cases Are Included in the Program

Almost all civil cases in which the parties are represented by counsel are eligible for the Circuit Mediation Program. Cases come to the program in a variety of ways. The primary mode is initiated by the court and is called the Settlement Assessment Conference. On occasion, cases are referred by panels of judges or by the Appellate Commissioner. Additionally, counsel may request than an appeal be included in the program.

1. The Settlement Assessment Conference

The mediators look to a document called the Mediation Questionnaire to help determine whether a case might be an appropriate candidate for inclusion in the mediation program. The Mediation Questionnaire is filed in the Ninth Circuit within 7 days of the docketing of an appeal or a petition for review. See Ninth Circuit Rules 3-4 and 15-2 for a description of cases excluded from the program. A fillable version of the Mediation Questionnaire is available on this court's website, www.ca9.uscourts.gov, under *Forms*.

Following the mediator's review of the Mediation Questionnaire, in the majority of cases, the court will order counsel to participate in a telephone conference with a circuit mediator to exchange information about the case, discuss the options the mediation program offers, and look at whether the case might benefit from inclusion in the mediation program. The initial assessment conference typically lasts between 30 minutes and an hour and includes a discussion of the case's litigation and settlement history. At the conclusion of the call, counsel and the mediator will decide whether further discussion would be fruitful. If it is agreed that further settlement discussions are not warranted, then the mediator will discuss with counsel any procedural or case management issues that may require attention, such as moving the briefing scheduling, consolidating cases, etc. As long as counsel are in agreement, the mediator will enter an order memorializing the agreements and not selecting the appeal for the Mediation Program. Additional

follow up telephone calls may be necessary before a consensus is reached about whether a case will be included in the mediation program.

If the there is a consensus to proceed to mediation, the appeal will be selected for inclusion in the Mediation Program. See Section C, The Mediation Process, below.

2. Panel Referrals

Approximately ten percent of the mediation program's cases come from referrals from panels of judges and from the Appellate Commissioner. Judges usually refer cases after oral argument, but before they submit the matter for decision. Sometimes the panel will inquire whether counsel believe such a referral would be beneficial; at other times the panel will simply refer the case. The Appellate Commissioner typically refers attorneys fees matters. Once a case has been referred, the assessment process generally follows the same process described above.

3. Requests From Counsel

Counsel are invited to contact the Chief Circuit Mediator if they would like to have an appeal included in the program. The request may be made confidentially, if so requested. Once a request has been received, the assessment follows the same process described above.

B. What Makes A Case A Good Candidate for Appellate Mediation?

In determining whether a particular case is appropriate for mediation, counsel, the parties, and the mediator will consider many factors, including the following:

- the parties' interest in participation;
- the certainty, or the possibility, that a Ninth Circuit decision will not end the dispute;
- a desire to make or avoid legal precedent;
- the existence of other appeals that raise the same legal issue;
- the desire to preserve a business or personal relationship;
- the existence of non-monetary issues;

- the possibility that a creative resolution might provide better relief than a court could fashion;
- a history of strong feelings that may have prevented effective negotiations;
- the possibility that one or all parties could benefit from a fresh look at the dispute;
- a desire to open and improve communications between or among the parties;
- the possibility that settlement efforts include more than the issue on appeal (e.g. interlocutory appeals or cases in which portions have been remanded to state court).

The program is not necessarily limited to the case that is on appeal in the Ninth Circuit as long as all parties are in agreement; the discussions may include additional parties and related cases in other courts, as well as issues that are not part of any litigation.

C. The Mediation Process

In each case selected for inclusion in the mediation program, the mediator will work with counsel to construct an effective, cost-sensitive settlement process. After the initial conference, the mediator may conduct follow-up conferences with counsel and the parties, in separate or joint sessions. These follow-up sessions may be held in-person or on the telephone. In-person mediations may be held at the court or, in appropriate cases, in other locations. Please see "The In-Person Mediation" section below for more information regarding in-person mediations.

Working with the mediator, the parties will determine what issues will be discussed in the mediation and how those discussions will proceed. In some cases, the focus of the mediation will be on the legal issues and possible outcomes of the appellate process. In other cases, it may be on rebuilding relationships or joint problem solving. Sometimes the mediator will facilitate direct discussions between the parties; at others he or she will act as an intermediary, shuttling back and forth between them. The mediator will try to resolve these various process issues in a manner that best serves the interests of the mediation participants.

No matter what the content of the discussions, the mediator will facilitate negotiations among the parties to help them devise a mutually acceptable resolution of their dispute. The mediator will ask questions, reframe problems, facilitate communications, assist the parties to understand each other and help

identify creative solutions. The mediator will not take sides, render decisions, offer legal advice or reveal confidences.

Settlement occurs when the parties find a resolution that is preferable to continued litigation. Factors that frequently favor settlement over litigation include speed, cost, certainty, control, creativity and flexibility.

D. The In-Person Mediation

- When all counsel and the mediator are in agreement, the mediator will schedule an in-person mediation. It may be held at the court or, in appropriate cases, in other locations. In planning the mediation, counsel should expect to address many of the following questions:
- Who is the appropriate decision maker on your side?
- Who might be the appropriate decision maker on the other side(s)?
- If your side is a governmental entity, who is the person most likely to be able to "sell" a negotiated solution to the appropriate decision-making body?
- Are there any non-parties whose presence at the mediation is necessary to effectuate a resolution? For example: insurance carriers, lien-holders, spouses, etc.
- What information do you need to make the mediation productive?
- What information might the other side need to make the mediation productive?
- What does the mediator need to know to prepare? What's the best way to get the mediator prepared?
- Does your client have any particular sensitivities of which the mediator should be aware?
- Is there any related litigation that should be included?
- What venue is most convenient to the greatest number of participants?
- Do you or your client have any calendar limitations? For example, scheduled vacations, long trials, etc.
- Does any participant have health or mobility issues that might need to be accommodated?

E. Preparing for Mediation

The most effective and efficient mediations are those in which counsel and their clients are fully prepared. Full preparation means understanding the case on a number of different levels. First, counsel will want to make sure they know the standard of review on appeal, understand the relevant law and facts, and have a good sense of both how the appeal fits into their client's litigation strategy and how the litigation itself serves the client's larger goals.

In addition, the following questions may be helpful to counsel and their clients in preparing for mediation:

- 1. Mediation works best when all participants know what really matters to them. What are the key needs and interests of yours that, if satisfied, would allow you to resolve this matter? Key needs or interests could be for example: certainty, closure, economic security, avoidance of legal precedent, avoidance of future litigation, fairness, respect, understanding, institutional change, etc.
- 2. Try to identify the key interests of the other parties to the dispute.
- 3. Assuming anything is possible, what would you like to talk about at the mediation? What do you think the other parties would want to discuss?
- 4. What choices do you remember making in the events that gave rise to the dispute? How might your actions have been misunderstood by the other parties to the dispute?
- 5. What could you find out at mediation that might help you understand the actions and choices of the other parties in this matter?
- 6. What is the emotional tenor of this dispute? What are your emotional hot buttons? What do you think the other parties' hot buttons might be? How might you best deal with your own emotions? How might the mediator help you do this?
- 7. Consider what will happen if you win the appeal. Consider what will happen if you lose the appeal. Will the appeal end the litigation? Might you or another party file bankruptcy? How much will it cost to pursue the appeal and subsequent proceedings, if any?

- 8. What practical concerns inform your thoughts about how to resolve this matter? Practical concerns might include tax consequences, precedential implications, satisfaction of lienholders, cash flow issues and attorney compensation.
- 9. What other concerns might be relevant to your thinking about how to resolve this case? For example, are there issues of principle for you or the other parties to the dispute?
- 10. What would it feel like to have the case proceed without a negotiated resolution? And end favorably to you? Unfavorably?
- 11. Will ending the litigation resolve the entire dispute? Might you have further contact with other parties to this matter? Do you have common business or personal associations?
- 12. Can you imagine a resolution (or resolutions) that would meet the needs and interests of all parties to the dispute? What would it feel like to have the dispute settled in a manner that was satisfactory to all parties? Are there other people to whom you'd want to be able to explain your decision to settle this matter?

CONFIDENTIALITY

In order to encourage efficient and frank settlement discussions, the Court exercises great care to ensure strict confidentiality of the settlement process. Circuit Rule 33-1 provides that settlement-related information disclosed to a court mediator will be kept confidential and will not be disclosed to the judges deciding the appeal or to any other person outside the Circuit Mediation Program participants. Documents and correspondence related to settlement are maintained only in the Circuit Mediation Office and are never made part of the main Ninth Circuit case file. E-mail correspondence and documents sent directly to the mediators or to the mediation unit are maintained separately from the court's electronic filing and case management system. Should the mediator confer separately with the participants, those discussions shall also be maintained in confidence from the other participants in the settlement discussions to the extent that the communicating parties request.

In addition, parties and their clients who participate in any aspect of the Circuit Mediation Program are expected to respect the confidentiality of the settlement processes and to adhere to the following:

- 1. Unless they indicate otherwise to the mediator at the initiation of any settlement discussions, all parties, attorneys and other participants in the settlement discussions are assumed to agree that any written or oral communication made by the mediator, or any party, attorney, or other participant in the settlement discussions:
 - a. may not be used for any purpose in any pending or future proceeding in this or any other court or administrative forum; and
 - b. may not be disclosed to anyone who is not a participant in the mediation or an authorized agent of a participant.
- 2. The nondisclosure provisions of paragraph (1) do not apply if such disclosure:
 - a. is agreed upon by all participants in the mediation and the court; or
 - b. is made in the context of a subsequent confidential mediation or settlement conference with the agreement of all participants and the subsequent third-party neutral.

IMMIGRATION

The court has adopted the selective use of mediation to help process the large number of immigration cases. Although immigration cases are often seen as all-or-nothing legal disputes, experience has shown that some immigration cases are very good candidates for settlement discussions. The cases which most readily lend themselves to mediation are those counseled cases in which the mediator can help the parties negotiate a procedural resolution, which is usually a stipulated remand to the Board of Immigration Appeals ("BIA") for more proceedings. Good cases for mediation include:

- Cases in which it seems likely that more proceedings are needed before the BIA, such as when the BIA did not consider all claims or issues, or where subsequent case law suggests that the Ninth Circuit will remand the case to the BIA for further consideration.
- Cases in which there have been developments in petitioner's life that provide the basis for a motion to reopen proceedings to apply for adjustment of status. The parties may be able to agree to file a joint motion to reopen.
- Cases in which a mediation conference call provides a useful forum for clarifying the procedural posture of the case (e.g., when motions are pending before the administrative agency), or exploring all possible forms of relief (e.g., identifying that petitioner is a member of a class in a class action or that petitioner may be covered by a new statute).
- In rare cases where the equities are such that the parties agree to leave the removal order in place, but the government agrees not to enforce it so long as petitioner does not violate certain conditions.

FREQUENTLY ASKED QUESTIONS

1. What is an assessment conference?

After reviewing the Mediation Questionnaire, the mediators select cases for a telephonic Settlement Assessment Conference, the purpose of which is to engage counsel in a discussion about whether the case might benefit from settlement efforts. The conference includes a discussion of the case's history, counsel's views on whether mediation would be appropriate, and the mediator's explanation of possible settlement procedures. At the conference (or sometimes at a subsequent follow-up conferences), counsel and the mediator will decide whether to include the case in the mediation program.

2. Who is expected to participate in an assessment conference?

The court expects that all counsel intending to file briefs in the case participate in the conference. If more than one attorney is representing a party, then the attorney with the most direct relationship with the client should participate. Co-counsel and other attorneys in the principal counsel's firm may attend if counsel believes their presence would be beneficial. Clients are not expected to participate in the initial assessment conference.

3. Is attendance at the assessment conference mandatory?

Yes. Attendance at the initial assessment conference is ordered by the court and is mandatory.

4. What if counsel is not available for the Assessment Conference as scheduled?

The mediation program will reschedule the initial Assessment Conference if counsel has a pre-existing obligation. Counsel should contact the mediation office by telephone [415-355-7900] or fax [415-355-8566] to request that the case be rescheduled. Ideally, counsel will have contacted opposing counsel first, and will include with the request a list of alternate dates and times available to all counsel.

5. Who initiates the call?

The mediator will initiate the call to all counsel listed in the court's order setting up the conference. If the order contains incorrect information, it is important that counsel correct this information in advance of the initial call.

6. Do clients participate in the assessment and other telephone conferences?

Clients are discouraged from participating in the initial assessment conference call. Depending upon the case, clients may participate in subsequent phone conferences, and will always participate in in-person sessions, but the initial assessment conference is intended for counsel only

7. How long will the conference last?

The initial assessment conference typically lasts from 30 to 60 minutes. Subsequent telephone conferences can vary in length, depending upon the nature and scope of the discussions.

8. Does a mediation statement need to be submitted?

No mediation statement is required for the initial assessment conference. If the case progresses further in the mediation process, the mediator may request that counsel submit mediation statements.

9. What does the mediator know about the appeal and what documents are available to the mediator before the assessment conference takes place?

Prior to holding the assessment conference, the mediator will have reviewed the Mediation Questionnaire filed by the appellant, the Ninth Circuit docket, and the lower court order from which the appeal stems. Sometimes the Mediation Questionnaire and the order appealed from contain a great deal of information, other times they contain very little. In all instances the mediator will give counsel the opportunity to explain their view of the case.

10. Who are the mediators?

The mediators are all experienced attorneys who come from a variety of backgrounds. All are highly trained in mediation and negotiation. The mediators are employees of the court and have been mediating for the court for from eight to twenty years. See "The Ninth Circuit Mediators," below.

11. Are mediators assigned a particular appeal according to its subject matter?

No. Appeals and petitions for review are assigned to all the mediators randomly, regardless of subject matter, with two small exceptions. All petitions for review related to the Bonneville Power Administration are assigned to Chris Goelz, and all petitions for review related to certain decisions of the Federal Energy Regulatory Commission are assigned to Lisa Evans.

12. Can the parties select a mediator from the program?

No, cases are assigned to the individual mediators in a random fashion. A mediator will, however, handle all related cases. In the event that related matters have been overlooked, requests to send them to the mediator with the earliest appeal are encouraged. Please note that Chris Goelz, who is based in our Seattle office, handles all cases originating in the state of Washington. The remaining cases are divided randomly among the other eight mediators, all of whom are located in the San Francisco office.

13. What if the parties wish to hire a private mediator?

If parties wish to hire a private mediator, the circuit mediator will manage the appeal (including adjustment of the briefing schedule) to accommodate the private mediation. The Ninth Circuit does not refer cases to private mediators, nor does it use a panel of private volunteer mediators

14. Can the mediators move or vacate the briefing schedule?

Yes, the mediators can vacate or extend the briefing schedule, but will do so only if all counsel are in agreement. If counsel cannot agree, a motion must be filed.

15. Does involvement of an appeal in the mediation program slow down the disposition of the appeal?

No. Typically if a case is mediated, the mediator (with the agreement of counsel) will vacate the briefing schedule. If the case does not settle, the mediator will establish a new briefing schedule. Doing so does not delay disposition of the appeal, as the court schedules oral argument based on the date the Notice of Appeal is filed, not on the dates the briefs are filed. In most cases, oral argument is scheduled later than 12 months after the filing of a notice of appeal, which usually allows enough time to mediate without delaying disposition of the case.

16. If an appeal is in the program, will the mediation take place in person? If so, where will it occur?

Each case is unique. One of the mediator's tasks is to make sure that the mediation process meets the needs of all participants, to the greatest extent possible. Thus, in one case the mediator will schedule multiple conferences over the telephone, while in another he or she will hold an in-person mediation. When an in-person mediation is scheduled, the mediator will make every effort to hold the session in a venue that is as convenient as possible for the greatest number of participants. Mediators will travel to locations throughout the Ninth Circuit when warranted.

17. Is there a cost to my client of participating in the mediation program?

No. The mediation program is a service of the court and is provided free of charge.

18. Does the mediation office take pro se cases, i.e. cases where at least one party is not represented by counsel?

No. The Ninth Circuit Rules exempt pro se cases from participation in the program. (See Rules.) The court, with the assistance of its Rules Committee, has made a policy decision to exclude unrepresented parties from participation in the mediation program.

19. Can I request that my case be included in the mediation program?

Yes. In any counseled case, counsel may send a request to be included in the program to the Chief Circuit Mediator. Such requests will be held confidential if counsel so requests.

20. How does appellate mediation differ from mediation at the District Court level?

Mediation at the appellate level is not particularly different from mediation at the District Court level. In both instances mediators help parties to explore their interests, think creatively, and develop solutions. The difference is that on appeal, a judge, jury or administrative agency has rendered an appealable decision. Sometimes that decision resolves all of the substantive issues in the case, and sometimes it resolves only some of them (e.g., appeals from preliminary injunctions or decisions about qualified immunity). Either way, the decision, and what is likely to happen to it on appeal, become part of the risk analysis the mediator uses to help the parties negotiate. That said, some cases lend themselves to appellate mediation better than others. See "What Makes a Case a Good Candidate for Appellate Mediation?", above.

21. Now that the court is using electronic filing, how is the confidentiality of mediation materials maintained?

Any document electronically filed with the court's clerk's office is not confidential and will appear on the court's electronic docket. The mediators can cause the clerk to remove mistakenly filed confidential documents after the fact, but counsel should exercise care in the first instance to avoid the filing of confidential documents with the court. All messages, correspondence and documents sent to the Mediation Program's e-mail address or sent to the individual mediators' e-mail addresses are maintained separately from the court's electronic filing and case management system and are confidential.

THE NINTH CIRCUIT MEDIATORS

The Ninth Circuit Mediation Program is staffed by a chief circuit mediator and eight circuit mediators who all work exclusively for the court of appeals. Eight are resident in the court's San Francisco headquarters; one is resident in the court's Seattle office. The mediators are all licensed attorneys who have an average of twenty-five years of combined private-law and mediation practice. They are all experienced and highly trained in appellate mediation, negotiation, and Ninth Circuit practice and procedure. The mediators are listed below:

Claudia L. Bernard Chief Circuit Mediator 415-355-7908 Claudia Bernard@ca9.uscourts.gov

Roxane G. Ashe Circuit Mediator 415-355-7911 Roxane Ashe@ca9.uscourts.gov

Margaret A. Corrigan
Circuit Mediator

Margaret Corrigan@ca9.uscourts.gov

Lisa J. Evans Circuit Mediator 415-355-7910

415-355-7905

Lisa Evans@ca9.uscourts.gov

Christopher A. Goelz Circuit Mediator (Seattle, WA) 206-224-2323

Chris Goelz@ca9.uscourts.gov

Ann Julius

Circuit Mediator 415-355-7906

Ann Julius@ca9.uscourts.gov

Stephen Liacouras Circuit Mediator 415-355-7915

Stephen Liacouras@ca9.uscourts.gov

C. Lewis Ross Circuit Mediator 415-355-7901

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Peter Sherwood Circuit Mediator 415-355-7909

Peter Sherwood@ca9.uscourts.gov

FOR MORE INFORMATION

If you would like more information regarding the Circuit Mediation Program please contact us via email, telephone or letter:

E-mail Address:

ca09 mediation@ca9.uscourts.gov

San Francisco Office:

Circuit Mediation Office
U.S. Court of Appeals
for the Ninth Circuit
James R. Browning Courthouse
95 Seventh Street
P.O. Box 193939
San Francisco, California

(415) 355-7900 (main line)

(415) 355-8566 (fax)

Seattle Office:

 $Circuit\ Mediation\ Office-Northwest\ Branch$

U.S. Court of Appeals for the Ninth Circuit

730 William Kenzo Nakamura Courthouse

1010 Fifth Avenue P.O. Box 193939 Seattle, Washington 98104-1130

(206) 224-2320 (main line)

(206) 224-2321 (fax)

Hours:

94119-3939

Office hours are 8:30 a.m. to 5:00 p.m.

Monday through Friday, excluding federal holidays.

RELEVANT RULES AND FORMS

The following are available on the Ninth Circuit Mediation Office website, www.ca9.uscourts.gov/mediation:

- Circuit Rule 3-4: Mediation Questionnaire
- Circuit Rule 15-2: Mediation Questionnaire in Agency Cases
- Federal Rule of Appellate Procedure 33: Appeal Conferences
- Circuit Rule 33-1: Settlement Programs Appeal Conferences
- Mediation Questionnaire
- Sample Motion to Dismiss
- Sample Stipulated Motion to Dismiss
- Sample Stipulated Motion to Dismiss Without Prejudice
- Sample Order to Dismiss Without Prejudice
- Sample Scheduling Order